

LAW OFFICES OF LISA M. SOLOMON
Lisa M. Solomon, Esq. (admitted *pro hac vice*)
One Grand Central Place
305 Madison Avenue, Suite 4700
New York, NY 10165
(212) 471-0067; Fax 212-980-6965
Lisa.Solomon@att.net

SCARINCI & HOLLENBECK, LLC
David Edelberg, Esq.
150 Clove Road, 9th Fl.
Little Falls, New Jersey 07424
201-896-4100; Fax 201-896-8660
DEdelberg@sh-law.com

Counsel for DC USA Operating Co., LLC

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY**

In re:
BED BATH & BEYOND INC., et al.,¹
Debtors.

Chapter 11 Case No. 23-13359 (VPF)
(Jointly Administered)
Hrg. Date: June 27, 2023 at 2:30 p.m.
Obj. Due: June 26, 2023 at 5:00 p.m.

**LIMITED OBJECTION OF LANDLORD
DC USA OPERATING CO., LLC TO DEBTORS' NOTICE OF
PROPOSED ASSUMPTION AND ASSIGNMENT OF LEASE AND CURE COSTS
AND RESERVATION OF RIGHTS**

DC USA Operating Co., LLC ("DC USA" or "Landlord"), by and through its undersigned counsel, respectfully submits this preliminary limited objection (the "Objection") to the Debtors' Motion for Entry of an Order, Pursuant to Sections 105, 363 and 365 of the

¹ The last four digits of Debtor Bed Bath & Beyond Inc.'s tax identification number are 0488. A complete list of the Debtors in these Chapter 11 Cases and each such Debtor's tax identification number may be obtained on the website of the Debtors' claims and noticing agent at <https://restructuring.ra.kroll.com/bbby>. The location of Debtor Bed Bath & Beyond Inc.'s principal place of business and the Debtors' service address in these chapter 11 cases is 650 Liberty Avenue, Union, New Jersey 07083.

Bankruptcy Code (I)(A) Approving the Auction and Bidding Procedures, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Bid Deadlines and an Auction, (D) Approving the Form and Manner of Notice Thereof, (E) Approving the Form APA and (II)(A) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases, (B) Authorizing the Assumption and Assignment of Assumed Contracts, (C) Authorizing the Sale of Assets and (D) Granting Related Relief (ECF No. 29) (the “Sale Motion”) (the “Sale Motion”).² In support thereof, Landlord respectfully states as follows:

BACKGROUND

1. The above-captioned debtors (each a “Debtor,” collectively the “Debtors”) filed voluntary petitions for relief pursuant to chapter 11 of title 11 of the United States Code (the “Code”) on April 23, 2023 (the “Petition Date”). The Debtors’ cases are being jointly administered.

2. Debtor Bed Bath & Beyond Inc., as tenant (“Tenant”), leases certain retail space from DC USA, as landlord, pursuant to an unexpired lease of nonresidential real property dated as of February 1, 2006, as amended by Amendment to Lease dated as of November 18, 2013, as amended by Second Amendment to Lease dated as of April 30, 2016 (the “DC USA Lease” or the “Lease”), located at that certain shopping center commonly known as DC USA at the northwest corner of 14th Street and Irving Street in Washington, D.C. (the “Shopping Center”).

3. The Lease is a lease of real property in a shopping center as that term is used in §365(b)(3) of the Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081, 1086-87 (3d Cir. 1990).

4. On April 25, 2023, the Court issued its Order (I) Approving the Auction and

² All terms used and not defined herein shall have the meanings assigned to such terms in the Sale Motion.

Bidding Procedures, (II) Approving Stalking Horse Bid Protections, (III) Scheduling Bid Deadlines and an Auction, (IV) Approving the Form and Manner of Notice Thereof, and (V) Granting Related Relief (ECF No. 92)(the “Bid Procedures Order”), with respect to the sale of substantially all of the Debtors’ assets.

5. Pursuant to the Bid Procedures Order, on June 13, 2023, the Debtors served and filed Notice to Contract Parties to Potentially Assumed Executory Contracts and Unexpired Leases (ECF No. 714), pursuant to which the Debtors identified, *inter alia*, certain unexpired leases that may be assumed and assigned in connection with a Sale Transaction with a Successful Bidder following an Auction and scheduled the purported amount that must be paid to cure any defaults existing under such unexpired leases (the “Contract Assumption and Cure Notice”).

6. The Lease is listed in the Contract Assumption and Cure Notice.

7. On June 22 and 23, 2023, the Debtors filed Notices (ECF Nos. 877 and 905) advising that the Debtors will not assume or assume and assign any Lease Assets to Overstock.com whom they have selected as the Successful Bidder and that the Debtors will seek approval of the Sale Transaction to Overstock.com at the Sale Hearing on June 27, 2023. To date, the Debtors have not withdrawn their Contract Assumption and Cure Notice.

8. This limited Objection is filed as a precautionary matter.

OBJECTION

I. THE DEBTORS’ PROPOSED CURE AMOUNT AS SET FORTH IN THE CURE NOTICE FAILS TO PROVIDE FOR PAYMENT OF ALL OBLIGATIONS DUE UNDER THE LEASE

9. Section 365(b)(1) of the Code provides:

If there has been a default in an . . . unexpired lease of the debtor, the

[debtor in possession] may not assume such . . . lease unless, at the time of assumption of such . . . lease the [debtor in possession] -

(A) cures, or provides adequate assurance that the trustee will promptly cure such default;

(B) compensates, or provides adequate assurance that the [debtor in possession] will promptly compensate, a party other than the debtor to such . . lease, for any actual pecuniary loss to such party resulting from such default. . .

10. Accordingly, the Tenant must cure, or provide adequate assurance that it will promptly cure, all outstanding amounts owed under the Lease before the Lease can be assumed and/or assumed and assigned to any third party at any time. The Debtors must also compensate or provide adequate assurance that the Tenant will promptly compensate for any actual pecuniary loss to Landlord, including attorneys' fees.

11. The Debtors have failed to pay DC USA as of the date hereof, \$176,648.80, which amount is due and owing to Landlord under the Lease and must be paid before the Lease can be assumed and/or assumed and assigned to any third party. The Debtors must also reimburse Landlord for all of its actual pecuniary losses, including but not limited to, attorneys' fees and costs expended with regard to the Debtors' bankruptcy proceedings. Itemizations of the cure amount due Landlord is annexed hereto as Exhibit "A."

12. Landlord objects to the Debtors' erroneous scheduling of proposed cure of \$136,588.27 with respect to the DC USA Lease, which understates the correct cure amount.

13. If the Lease is to be assumed or assumed and assigned, the Debtors or the assignee are required to first pay DC USA the correct cure amount in accordance with section §365(b) of the Code, together with any other amounts accruing under the Lease between the date of this filing and the date that the Lease is actually assumed or assumed and assigned.

II. THE DEBTORS HAVE FAILED TO PROVIDE ADEQUATE ASSURANCE

14. In addition to cure, if the Lease is to be assumed and assigned to any third party, DC USA is entitled to adequate assurance of future performance by any assignee under §365(f)(2)(B) of the Code. As a shopping center lease, the Debtors must meet the heightened standard of adequate assurance. This requires satisfaction of the adequate assurance provisions of §365(b)(3), which requires adequate assurance of:

- (i) the source of rent and that the financial condition and operating performance of the proposed assignee and its guarantors, if any, must be similar to the financial condition and operating performance of the debtor and its guarantor(s), if any, as of the time the debtor became the lessee (11 U.S.C. §365(b)(3)(A));
- (ii) that any percentage rent due under the lease will not decline substantially (11 U.S.C. §365(b)(3)(B));
- (iii) that assumption and assignment of the lease is subject to all provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision in any other lease (11 U.S.C. § 365(b)(3)(C)); and
- (iv) that assumption and assignment of the lease will not disrupt the tenant mix or balance in the shopping center (11 U.S.C. §365(b)(3)(D)).

15. Should the Debtors propose an assignee for the Lease at any time in these proceedings, including with respect to any Phase I or Phase II Lease Auction, no assumption and assignment of the Lease may occur unless Debtors provide DC USA with adequate assurance information as required under § 365(b). In addition, DC USA objects to any proposed assumption and assignment that does not require the assignee to comply with all of the terms of the Lease, as required by § 365(b)(3), including but limited to all use restrictions under the Lease and exclusives granted to other tenants in the Shopping Center that the Debtor tenant has agreed pursuant to its Lease to honor.

III. RESERVATION OF RIGHTS

16. Landlord reserves all rights to object to any proposed sale and assumption and assignment of the Lease on any grounds, and to raise other and further objections whether in writing prior or subsequent to or orally at the Hearing, if a successful bidder is designated at any time for the Lease, including but not limited to, Landlord's rights to: (a) have the Lease assumed and assigned subject to all of the Lease's provisions, including all use restrictions and prohibitions and exclusivity restrictions, under §365(b)(3) of the Code; (b) object to the assumption and assignment of the Lease to a successful bidder on the ground of lack of adequate assurance of future performance; and (c) object pursuant to §365(l) of the Code to any assumption and assignment of the Lease absent guaranties of the assignee's obligations under the Lease, and all such rights are preserved and not waived.

WHEREFORE, DC USA respectfully requests that the Court: (i) sustain this Limited Objection; and (ii) grant such other relief as the Court deems just and proper.

Dated: June 23, 2023

SCARINCI & HOLLENBECK, LLC
150 Clove Road, 9th Fl.
Little Falls, New Jersey 07424

By: /s/ David Edelberg
David Edelberg

LAW OFFICES OF LISA M. SOLOMON
Lisa M. Solomon, Esq. (admitted *pro hac vice*)
305 Madison Avenue, Suite 4700
New York, New York 10165
Tel. (212) 471

Counsel for DC USA Operating Co., LLC

EXHIBIT A

DC USA

Bed Bath & Beyond Open Invoices / Credit Memos
As of 6/20/23

Type	Date	Num	Memo	Open Balance
Payment	4/3/2017	5173957	PNC MM - 8026309774	-30.00
Invoice	3/8/2018	241	Real Estate Tax Escalation for the period 10/1/17 - 3/31/18 @ 12.72% (please see attached)	290.15
Credit Memo	8/26/2021	336	Pro-Rata Credit Related to Reduction in the Tax Year 2017 Property Assessment (@ 12.00%)	-20,756.11
Invoice	11/1/2020	313	Domestic Water Charges for the period 8/27/20 - 9/25/20 (see enclosed)	561.49
Invoice	11/28/2020	315	Domestic Water Charges for the period 9/26/20 - 10/27/20 (see enclosed)	3.00
Invoice	12/14/2020	316	Domestic Water Charges for the period 10/28/20 - 11/27/20 (see enclosed)	527.66
Invoice	12/31/2020	318	Domestic Water Charges for the period 11/28/20 - 12/24/20 (see enclosed)	535.77
Invoice	2/13/2021	320	Domestic Water Charges for the period 12/25/20 - 1/27/21 (see enclosed)	545.14
Invoice	4/2/2021	325	Domestic Water Charges for the period 2/26/21 - 3/25/21 (see enclosed)	548.53
Invoice	5/21/2021	328	Domestic Water Charges for the period 3/26/21 - 4/26/21 (see enclosed)	542.50
Payment	6/10/2021	48672	PNC MM - 8026309774	-90.00
Invoice	8/8/2021	332	Domestic Water Charges for the period 5/27/21 - 6/24/21 (see enclosed)	552.96
Invoice	8/8/2021	333	Domestic Water Charges for the period 6/25/21 - 7/27/21 (see enclosed)	573.21
Invoice	9/8/2021	338	Domestic Water Charges for the period 7/28/21 - 8/25/21 (see enclosed)	560.02
Credit Memo	10/8/2021	341	Credit for Real Estate Tax Escalation for the period 10/1/20 - 3/31/21 @ 12.72% due to Reduction...	-8,445.31
Invoice	12/11/2021	344	Domestic Water Charges for the period 8/26/21 - 9/27/21 (see enclosed)	463.07
Invoice	12/11/2021	345	Domestic Water Charges for the period 9/28/21 - 10/27/21 (see enclosed)	554.42
Invoice	12/14/2021	346	Domestic Water Charges for the period 10/28/21 - 11/26/21 (see enclosed)	556.05
Invoice	12/31/2021	352	Domestic Water Charges for the period 11/27/21 - 12/27/21 (see enclosed)	570.79
Invoice	7/31/2022	358	Domestic Water Charges for the period 12/28/21 - 1/27/22 (see enclosed)	554.33
Invoice	7/31/2022	358	Domestic Water Charges for the period 1/28/22 - 2/25/22 (see enclosed)	546.69
Invoice	7/31/2022	358	Domestic Water Charges for the period 2/26/22 - 3/25/22 (see enclosed)	575.19
Invoice	8/31/2022	361	Domestic Water Charges for the period 3/26/22 - 4/26/22 (see enclosed)	555.85
Invoice	8/31/2022	361	Domestic Water Charges for the period 4/27/22 - 5/25/22 (see enclosed)	545.00
Invoice	8/31/2022	361	Domestic Water Charges for the period 5/26/22 - 6/27/22 (see enclosed)	567.33
Invoice	10/24/2022	364	Domestic Water Charges for the period 6/28/22 - 7/26/22 (see enclosed)	555.96
Invoice	10/24/2022	364	Domestic Water Charges for the period 7/27/22 - 8/24/22 (see enclosed)	544.62
Invoice	10/24/2022	364	Domestic Water Charges for the period 8/25/22 - 9/27/22 (see enclosed)	447.02
Invoice	11/28/2022	366	Domestic Water Charges for the period 9/28/22 - 10/27/22 (see enclosed)	560.75
Invoice	12/7/2022	367	Domestic Water Charges for the period 10/28/22 - 11/28/22 (see enclosed)	570.17
Invoice	12/31/2022	369	Domestic Water Charges for the period 11/29/22 - 12/27/22 (see enclosed)	576.48
Invoice	3/2/2023	373	Domestic Water Charges for the period 1/28/23 - 2/27/23 (see enclosed)	464.31
Invoice	3/15/2023	375	Real Estate Tax Escalation for the period 10/1/22 - 3/31/23 @ 12.72% (please see attached)	136,123.96
Invoice	4/1/2023	374	April 2023 Rent	43,876.43
Invoice	4/1/2023	374	April 2023 Common Area Maintenance (CAM)	9,955.73
Invoice	4/9/2023	376	Domestic Water Charges for the period 2/28/23 - 3/26/23 (see enclosed)	521.36
Invoice	5/15/2023	379	Domestic Water Charges for the period 3/27/23 - 4/26/23 (see enclosed)	482.03
Invoice	6/15/2023	381	Domestic Water Charges for the period 4/27/23 - 5/24/23 (see enclosed)	562.25
TOTAL				176,648.80